UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

BALESTRIERE LANZA PLLC, Index No. 08-cv-4731 (GEL)

> Plaintiff, PLAINTIFF'S MEMORANDUM

> > IN REPLY TO DEFENDANT'S

RESPONSE TO PLAINTIFF'S

- against -**MOTION TO REMAND**

SILVER POINT CAPITAL, LP,

Defendant.

PRELIMINARY STATEMENT

On March 27, 2008, Plaintiff law firm filed this action against Silver Point Capital, LP to collect approximately \$73,496 in unpaid legal fees. On May 15, 2008, Silver Point answered the Complaint and added two counterclaims, requesting \$250,000 in damages. On the basis of Silver Point's counterclaims, Plaintiff sought to remove this action to federal court. Plaintiff served the removal petition on Silver Point's counsel (hereinafter "Defendant") on May 21, 2008 at 12:22 p.m. (Exhibit A at 3.)

That same day, at approximately 4:30 p.m., Defendant contacted Plaintiff (Exhibit B at 2), alerting Plaintiff that the notice of removal was improper, as only a defendant may remove an action, regardless of whether defendant later counterclaims. Fewer than twenty-four hours later, at 9:23 a.m. on May 22, 2008, Plaintiff sent an email to Defendant conceding the point. (*Id.* at 3.)

Plaintiff then proposed a joint call to the Court, hoping the Court might summarily remand the case under 28 U.S.C. § 1446(c) by simply taking account of the

clear defect of Plaintiff's petition. (*Id.* at 1.) Defendant, however, refused, insisting that a call to the court would be "inappropriate." (*Id.* at 1.)

Plaintiff then filed the instant motion to remand on June 3, 2008. In its response, Defendant did not oppose Plaintiff's motion but, rather, moved for fees and costs under 28 U.S.C. § 1447(c). (Def.'s Resp. 3.)

ARGUMENT

Both parties agree that Plaintiff's motion to remand should be granted. The only issue is Defendant's apparent request for fees and costs on the last page of its response.

28 U.S.C. § 1447(c) affords the district court discretion to award attorney's fees and costs if an order to remand is entered. *Morgan Guar. Trust Co. v. Republic of Palau*, 971 F.2d 917, 924 (2nd Cir. 1992) (explaining that Section 1447(c) is principally designed to compensate *plaintiffs*, not defendants, for the costs of opposing removal). This provision states "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). The Supreme Court has recently clarified that this provision does not afford an automatic award of attorney's fees and costs. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005) (holding that attorney fee provision of the removal statute does not create a strong presumption in favor of awarding fees on remand).

I. <u>Defendant Is Not Requesting Reasonably Attorney's Fees</u>

A party seeking attorney's fees has the burden of establishing that his attorney expended a *reasonable* amount of time. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). Here, however, Defendant's request for \$3,500 in fees is completely unreasonable.

Plaintiff served Defendant with a courtesy copy of the notice of removal by email at 12:22 p.m. on May 21, 2008. (Exhibit A at 2.) Defendant then contacted Plaintiff at approximately 4:30 p.m., requesting that Plaintiff call Defendant to discuss the notice of remand. (*Id.* at 1.) By 9:23 a.m. on May 22, 2008, Plaintiff's counsel had conceded Defendant's counsel's point. (Exhibit B at 3.) Thus, Defendant's counsel could have spent only four hours confirming Plaintiff's error. Indeed, Defendant routed Plaintiff's notice of removal in fewer then twenty-four hours by making one phone call.

Still, Defendant makes the unsupported claim that Plaintiff's notice of remand cost Defendant \$3,500 in legal fees. (Def.'s Resp. 3.)

Indeed, Defendant states the rules governing removal are "not complex," that removal procedure is basic and commonsensical. (*Id.* at 1.) Notwithstanding, Defendant maintains that it incurred \$3,500 in costs and expenses in "confirm[ing] what counsel understood as the law" and in "having to discover and remedy Plaintiff's mistake." (*Id.* at 2.) Defendant omits the fact that it did not write a motion to "remedy Plaintiff's mistake" but rather made one phone call.

Additionally, in an email communication on April 30, 2007, Defendant stated that it would handle this matter *pro gratis*. (Exhibit C.) If Defendant's April 30, 2007, email is truthful, then the unsupported claim that Defendant "incurred" \$3,500 in fees and costs is even more problematic than it initially appears.

Finally, Defendant decries the time spent on this matter. (Def.'s Resp. 2.) Yet, at the same time, Defendant has been completely unwilling to contact the Court (Exhibit B

at 1), even though a call to the Court may have given the Court an opportunity to summarily remand the matter pursuant to 28 U.S.C. § 1446(c)(4).

Defendant's request for fees and costs is thus unreasonable, and Defendant's application for fees should be denied.

II. <u>Defendant Cannot Substantiate Its Request for \$3,500 in Fees</u>

Defendant cannot satisfy its burden that it is entitled to the amount of fees it seeks. As the fee applicant, Defendant "bear[s] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). "The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed." Greenidge v. Mundo Shipping Corp., 60 F.Supp. 2d 10, 13 (E.D.N.Y. 1999) (Fee applicant bears the burden of establishing entitlement to award).

Defendant has thus far offered a sparse catalog of efforts made to "discover and remedy Plaintiff's mistake." (Def.'s Resp. 3.) Indeed, Defendant provides no records to support the amount of fees Defendant requests. Defendant does not even identify the attorneys who worked on the research or detail the tasks each attorney performed.

Defendant does not because it cannot. There is no way Defendant could incur \$3,500 in fees in the short time in between when Plaintiff filed the notice of remand and Plaintiff conceded Defendant's point.

As a consequence of its deficient supporting evidence, Defendant cannot recover the \$3,500 in attorney's fees it requested, and any application for an award of fees and costs should be denied.

CONCLUSION

For the foregoing reasons, Plaintiff's motion to remand should be granted, and Defendant's request for an award of attorney's fees and costs should be denied.

Dated:New York, New York June 24, 2008 Respectfully submitted,

s/ Craig Stuart Lanza

Craig Stuart Lanza (CL-2452) John Balestriere (JB- 3247)

BALESTRIERE LANZA PLLC

225 Broadway, Suite 2900 New York, NY 10007

Telephone: (212) 374-5400 Facsimile: (212) 208-2613

Attorneys for Plaintiff

Exhibit A

Subject: Re: Notice of Removal

From: Craig Stuart Lanza <clanza@balestriere.net>

Date: Wed, 21 May 2008 16:46:35 -0400

To: Philip G Barber <PBarber@paulweiss.com>

Philip:

Called you back. Give me a call on my cell when you get the chance.

Thanks,

Craig

Craig Stuart Lanza BALESTRIERE LANZA PLLC 225 Broadway, Suite 2900 New York, NY 10007 Direct 212-374-5404 Mobile 917-573-4273 Facsimile 212-208-2613 clanza@balestriere.net www.balestriere.net

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Philip G Barber wrote:

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Craig
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I tried to reach you by phone; could you give me a call?

Philip G. Barber | Counsel*

Paul, Weiss, Rifkind, Wharton & Garrison LLP* 1285 Avenue of the Americas | New York, NY 10019-6064 (212) 373-3356 (Direct Phone) | (212) 492-0356 (Direct Fax)_ __pbarber@paulweiss.com_ <mailto:PBarber@paulweiss.com> | _www.paulweiss.com_

"Craig Stuart Lanza" <clanza@balestriere.net>

05/21/2008 12:22 PM Please respond to clanza@balestriere.net Re: Notice of Removal

To
Philip G Barber/PaulWeiss@PaulWeiss

CC

Subject
Notice of Removal

Mr. Barber:

Please see the attached notice of removal filed in Federal Court yesterday in the late afternoon. Let me know if you are willing to except service.

Speak to you soon and thanks,

Craig

__

Craig Stuart Lanza
BALESTRIERE LANZA PLLC
225 Broadway, Suite 2900
New York, NY 10007
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Exhibit B

Subject: Re: [Fwd: Re: Notice of Removal]

From: "Philip G Barber" <PBarber@paulweiss.com>

Date: Thu, 29 May 2008 17:19:23 -0400 **To:** "clanza" <clanza@balestriere.net>

Craig

We do not believe that a call to the Court is necessary or appropriate. Silver Point will not consent to any application to the Court by your client other than a motion to remand, and such consent is conditioned on Silver Point's reservation of its right to seek reimbursement of its fees and costs incurred in connection with any motion to remand. Finally, if your client has not moved to remand by next Wednesday, June 4, Silver Point will make its own application to the Court.

Please call me if you have any questions.

Philip G. Barber | Counsel
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas | New York, NY 10019-6064
(212) 373-3356 (Direct Phone) | (212) 492-0356 (Direct Fax)
pbarber@paulweiss.com | www.paulweiss.com

---- Original Message -----

From: "Craig Stuart Lanza" [clanza@balestriere.net]

Sent: 05/29/2008 03:51 PM AST

To: Philip Barber

Subject: [Fwd: Re: Notice of Removal]

Philip:

We are reaching out to set up a time to call the Court. I believe a call with the Court with both of us on the line makes sense here. If you are not willing to do so, please let me know.

Thanks,

Craig

Craig Stuart Lanza
BALESTRIERE LANZA PLLC
225 Broadway, Suite 2900
New York, NY 10007
Direct 212-374-5404
Mobile 917-573-4273
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------ Original Message -------- Subject: Re: Notice of Removal

Date: Tue, 27 May 2008 09:01:24 -0400

From: Craig Stuart Lanza <clanza@balestriere.net>

Reply-To: clanza@balestriere.net
Organization: BALESTRIERE PLLC

To: Philip G Barber <PBarber@paulweiss.com>

References:

<OFFF50AD1C.B14F5C9D-ON85257451.004DB89A-85257451.004E53EB@paulweiss.com>

Philip:

I am not certain why a Rule 41 dismissal would not work here. Regardless, we would like to do a call with the Court soon to address the issue. What is your availability?

Thanks,

Craig

Craig Stuart Lanza
BALESTRIERE LANZA PLLC
225 Broadway, Suite 2900
New York, NY 10007
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Mobile 917-573-4273
Facsimile 212-208-2613
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Philip G Barber wrote:

Craig

It appears that an order of remand will be required, and there should not be any exparte appearances in connection with the remand. Please also be advised that pursuant to 28 U.S.C. 1447(c), Silver Point expects to be paid the fees and costs incurred by its counsel in researching any issue with respect to removal and remand, as well as any fees and costs incurred in connection with remand.

Philip G. Barber | Counsel*
Paul, Weiss, Rifkind, Wharton & Garrison LLP*
1285 Avenue of the Americas | New York, NY 10019-6064

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__pbarber@paulweiss.com_ <mailto:PBarber@paulweiss.com> |
_www.paulweiss.com_
*"Craig Stuart Lanza" <clanza@balestriere.net>*
05/22/2008 09:23 AM
Please respond to
clanza@balestriere.net
To
    Philip G Barber/PaulWeiss@PaulWeiss
CC
Subject
   Notice of Removal
Per our discussion yesterday we will withdraw the notice of removal. I
will keep you updated on the withdrawal.
Craig Stuart Lanza
BALESTRIERE LANZA PLLC
225 Broadway, Suite 2900
New York, NY 10007
Direct 212-374-5404
Mobile 917-573-4273
Facsimile 212-208-2613
clanza@balestriere.net
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Exhibit C

Subject:

From: "Gerard E Harper" < gharper@paulweiss.com>

Date: Mon, 30 Apr 2007 12:11:07 -0400 **To:** "John Balestriere" <jb@balestriere.net>

CC: "Kenneth M Schneider" <kschneider@paulweiss.com>, "Gary J Finiguerra"

<GFiniguerra@paulweiss.com>

Dear Mr. Balestriere:

Your surprising email of the 23rd has been forwarded to me for response.

My client sent you a check for \$20,000.00 expressly in full and final satisfaction of any obligation owed to you. You accepted this money, and cashed the check. As far as we are concerned, this matter is closed.

You should direct any further communication on this matter solely to me and under no circumstances are you to communicate with my client. As far as your continued threats are concerned, be advised that any action by you will be met with one for professional malpractice against you and your firm, which my firm has volunteered to handle at our own expense.

Very truly yours,

Gerry Harper

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